



REPUBLIC OF KENYA



AAO v BOO (Civil Appeal E077 of 2023) [2025] KEHC 6209 (KLR) (19 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E077 OF 2023
BM MUSYOKI, J
MAY 19, 2025**

BETWEEN

AAO APPELLANT

AND

BOO RESPONDENT

*(Being appeal from judgment and decree of Chief Magistrate's Courts at Winam
(C.N.C Oruo PM) children's case number E017 of 2022 dated 4-03- 2023)*

JUDGMENT

1. This is a children matter emanating from the Senior Principal Magistrate's court at Winam. The appellant approached the subordinate court asking for maintenance and custody of the minor (E00) in the following terms;
 - a. The legal and actual custody of the minor be awarded to the plaintiff (appellant).
 - b. An order be issued compelling the defendant (respondent) to provide sufficient maintenance for the minor as pleaded in paragraph 12 hereinabove.
 - c. Any other relief the Honourable Court may deem fit to grant.
2. The appellant later amended her plaint to include a claim of Kshs 547,561.57 being the amount she had spent prior to institution of the suit and which she sought to be refunded.
3. The respondent filed his defence dated 22-06-2022 in which he admitted that the minor was his child but denied what the appellant was proposing as the needs of the child and added that he was always supporting the minor and had not neglected him. From what I get from the record, the main contest in the trial was the extent to which the parties were to share parental responsibilities to the child.
4. The respondent took position that the needs of the child were exaggerated and the appellant was portraying her financial position as vulnerable in order to get the court's sympathy and load the



responsibilities to the minor on him. The respondent argued that the appellant chose to take the minor to a private international school where the school fees were exorbitant and beyond the his reach.

5. After the full hearing, the Honourable Magistrate gave final order as follows;
 - a. Custody to be joint with the plaintiff having actual and physical custody and the defendant getting access and visitation rights which shall be structured.
 - b. If the child is to attend [Particulars Withheld] Academy, then the defendant shall pay school fees up to Kshs 70,000.00 per year which he would have paid had the child been to a public school plus related expenses with the plaintiff paying the balance.
 - c. If the child is to attend [Particulars Withheld] Yala or any other public school the defendant shall pay all the school fees for the minor in addition to the school related expenses.
 - d. The defendant shall take out/include the child into NHIF comprehensive cover which will take care of the child's medical needs.
 - e. The defendant shall pay the plaintiff Kshs 20,000.00 monthly maintenance for the child. The same is to be paid only during the school holidays.
 - f. The plaintiff shall cater for clothing and shelter for the child.
 - g. There shall be no orders for reimbursement of Kshs 547,561.57 to the defendant.
 - h. There shall be no orders to costs this being a children's matter of both parties.
6. Being aggrieved with the above decision, the appellant has approached this court with a memorandum of appeal dated 31st May 2023 citing 14 grounds which in summary fault the Magistrate's finding on school fees, medical cover, reimbursements of Kshs 547,561.57 and maintenance. In essence, the appellant seems to state that the Magistrate erred in apportioning all the responsibilities.
7. The appellant filed her submissions dated 23rd July 2024 while the respondent chose to stay away from the proceedings as there are no submissions filed on his behalf. The proceedings show that the respondent also shunned court attendances despite having been served. Reading through her submissions, the appellant does not seem to propose the share she was or is willing to take. All that she has done is to lament that she is not working or having any income while the respondent is earning good income.
8. The appellant has stated that she used to work with Kenya Medical Research Institute but her contract lapsed in 2019. She does not tell the court whether she has been making any efforts in getting another job. She claimed to have been surviving on her savings from her previous employment. The respondent also told the court that he was working on contract with Save the Children which was set to lapse in December 2022. There is no evidence of the respondent's subsequent employment or engagement.
9. In my mind, both parties were in the same pedestal in terms of employment as they claimed that their contracts had come to an end and they seem to have kept the court guessing on their income. Be that as it may, the child must be provided for in equal measure by both parents. While the earning and financial capacity of the parents is a ground for consideration in matters of child maintenance, none of the parents should be loaded with the responsibility of the child's needs more than the other. That is the tenet of Article 53(1)(e) of *the Constitution* and Section 8 of the Children's Act Chapter 141 of the Laws of Kenya. Lack of work or income cannot be a reason for failure by any of the parents to



take up their responsibilities. I agree with Honourable Justice J.N. Onyiego in *MOA v HAO* (2021) eKLR where he held that;

‘It will be too much to demand 100% maintenance from one parent while the other is playing the role of spectator yet claim to be a responsible parent. Children matters or needs should not be used to punish one parent at the comfort of another parent. Children should be viewed as a blessing to parents but not a curse. To overburden one parent at the comfort of another will be tantamount to punishing the overburdened parent and to some extent perpetuating irresponsibility or laxity on a parent who is duty bound to contribute towards a child’s welfare.’

10. Based on the above, it is my holding that the respondent and the appellant had equal responsibilities to take care of the child and any apportionment should be based on equitable share. Equitable share of course does not mean a cent-to-cent equality but in a manner that the burden is not skewed against any of the parties considering the circumstances and needs of the child. What this court should consider is whether the apportionment by the Magistrate was equitable in the circumstances of the parties with the best interest of the child being of paramount consideration.

The appellant gave the needs of the child as follows;

- a. Food Kshs 15,000.00 per month.
 - b. Shelter Kshs 15,000.00 per month.
 - c. Electricity Kshs 1,500.00 per month.
 - d. Water Kshs 1,000.00 per month.
 - e. Clothing Kshs 35,000.00 per annum.
 - f. Shopping and groceries Kshs 15,000.00 per month.
 - g. House help Kshs 15,000.00 per month.
 - h. Medical and dental insurance Kshs 18,000.00.
 - i. School bags, informs, sweaters, transport and text books Kshs 35,000.00 per annum.
 - j. School fees as per fees structure.
 - k. Pocket money Kshs Kshs 5,000.00 per month.
 - l. Entertainment;
DSTV premium package Kshs 8,400.00 per month.Home internet Kshs 4,000.00 per month.Travels and Tours Kshs 300,000.00 per annum.
11. A look at the above, the monthly expences would be in a, b, c, d, f, g, h, k, and bulleting one and two of l. As per the respondent’s figures, this will translate to Kshs 97,900.00. In my assessment, items in l could not be considered as needs for the child who was admittedly in a boarding school. In addition, the appellant did not demonstrate to the court that those items were in place or provided to the child before the filing of the suit and even if they were provided in the home, the child would not use them when in school.
12. The appellant did not justify why a child in a boarding school would require Kshs 5,000.00 per month which translates to Kshs 15,000.00 per term as pocket money assuming that a school term in Kenya takes an average of three months. The medical expences were also not justified and in any event the



- trial court ordered that the respondent takes a comprehensive cover for the child which means that the appellant was not to shoulder any responsibility of medical expences.
13. There was no proof of the payments of the house help or whether one was needed and if so whether the need was for the child since the child was in the larger part of the year in a boarding school. The same goes for the food and groceries which are one item split into two in order to shore up the needs. The said items appear to me to be exaggerated.
 14. The school fees and related expences which were ordered to be the responsibility of the respondent would obviously include boarding facilities which constitute food and shelter during the period the schools are in session. In my analysis the amount of Kshs 20,000.00 the respondent was ordered to contribute for child's maintenance during the school holiday was equitable. If we were to go with the constitutional principal of equal responsibility, it would mean that during school holidays, the child would spend Kshs 40,000.00 inclusive of rent and related residential costs.
 15. When it came to school fees and related expences, the appellant was ordered to shoulder items i and j above. The child was admitted into a public school where the fees was not more than Kshs 70,000.00. The appellant chose without consulting the respondent who, in law has a right to participate in making decision involving the child's development and welfare, to enroll the child in [Particulars Withheld] Academy which is said be an international school and whose fees was more than triple what the appellant expected. According to the respondent, which the appellant did not rebut, he preferred [Particulars Withheld] Yala which was affordable to him.
 16. The appellant claims that [Particulars Withheld] Academy was the best suited for the child considering his medical condition and ease of visiting him because the schools he had been admitted to were in far counties. She however did not explain why [Particulars Withheld] Academy of all the other schools available in Kisumu County including the proposed [Particulars Withheld] Yala. She did not tell the court that she tried admitting the child in other affordable school and was unbale.
 17. Just as the Magistrate observed, I have not seen any demonstration of special needs which can only be given in [Particulars Withheld] Academy and not available in other schools proposed by the respondent. The receipts produced by the appellant in proof of special needs of the child are receipts for medical treatment and expences. There is no medical report to proof the condition. The receipts do not say much about the child's special needs which would make [Particulars Withheld] Academy as the only option for the child's condition.
 18. The appellant has argued that the respondent was preferring his relatives' children his to his own. The fact that the appellant was supporting other children who are not his does not mean that he preferred those other children to the child herein. The appellant did not demonstrate that the respondent's other children were going to international schools or getting preferential treatment which would have demonstrated discrimination. In my view, demanding that the respondent pays school fees in an expensive school would be putting the child herein in a higher level than the other children. Since the respondent did not participate in the decision to take the child to the academy and the child was admitted there against his wishes, he could not be forced to pay the school fees to that school. In view of this, I do uphold the Magistrate's finding on the school fees and related expences.
 19. The final issue is whether the appellant was entitled to a refund of what she claimed to have spent prior to the suit. In children matters, unless there was a parental responsibility agreement, a parent can only be ordered to provide maintenance with effect from the time an order of the court to that effect is issued. The appellant argues that she specifically pleaded and proved the said sum and it should have been refunded. These are not special damages as such damages are considered as compensation for a wrong done on the claimant or his property. This is a children's case and the appellant was just a party



on behalf of the child and she cannot therefore claim to have suffered special damages. She spent the money in her capacity as a parent to her own child and even if the expenses were refundable, it would not be the whole amount but half of it. All in all, I find the claim unjustified and seeking to set a bad precedent and it must be disallowed.

20. The upshot of the above analysis is that I find no merits in this appeal and the same is hereby dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Maube for the appellant and in absence of the respondent.

